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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 121

L. L. MOORE,

Petitioner,

vs.

MEAD'S FINE BREAD COMPANY, A CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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1. Respondent's Restrictive Theory of the Scope of the Robinson-Patman Act Is Contrary to the Legislative History of the Interpretation of the Act by This and Other Courts.

Respondent takes the position that because petitioner was wholly in intrastate commerce, necessarily the effect of respondent's price discrimination was strictly local, so that the effect on interstate commerce must be insubstantial and inconsequential. (Resp.'s Brief 17, 19, 25) The same idea is put by respondent in various other ways—if the

effect on interstate commerce is inconsequential, it is outside the power of Congress (Resp.'s Brief 17, 24, 33, 36)—the amended Clayton Act occupies no greater area than the Sherman Act, so it cannot extend to local or insubstantial or inconsequential acts (Resp.'s Brief 17, 19, 25)—sales at Farwell, Texas, were not competitive with those in Santa Rosa, New Mexico (Resp.'s Brief 19, 24, 25, 29, 31)—antitrust laws reflect only upon the subject of goods moving interstate (Resp.'s Brief 32)—personal grievances are not actionable (Resp.'s Brief 51)—the discriminatory sale must be made in commerce (Resp.'s Brief 22, 23)—and, that petitioner, being wholly in intrastate commerce, is without the protection of the amended Clayton Act. (Resp.'s Brief 29)

Petitioner has heretofore meticulously brought to the Court's attention the relevant history of the Robinson-Patman Act. For one to say that the amended Clayton Act did not occupy an area greater than either the Sherman Act or the old Clayton Act is a gross attempt to mislead this Court. The whole purpose of the original Clayton Act and its amendment, the Robinson-Patman Act, was to prohibit particular trade practices which the Congress found by experience in and of themselves were not covered by existing antitrust legislation and which had to be stopped in their incipiency if monopolies were to be prevented from creation. *Standard Fashion Co. v. Magrene-Ho[illegible]n Co.*, 258 U. S. 346, 355, 42 S. Ct. 360, 362, 66 L. Ed. [illegible] *Corn Products Refining Co. v. F. T. C.*, 324 U. S. 726, 738, [illegible]5 S. Ct. 961, 967, 89 L. Ed. 1320; *F. T. C. v. Morton Salt Co.*, 334 U. S. 37, 43, 68 S. Ct. 822, 826, 92 L. Ed. 1196; *Times-Picayune Pub. Co. v. U. S.*, 345 U. S. 594, 609, 73 S. Ct. 872, 880, 881, 97 L. Ed. 819; Sen. Rep. No. 1502, 74th Cong., 2d Sess. (1936) 4.

The constitutionality of the Clayton Act not only has not

been seriously questioned previously, but it has been specifically upheld as to one wholly in intrastate commerce. In *Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp.*, 178 F. 2d 150, 152 (CCA 2d), where the plaintiff New York corporation was a cosmetics dealer in the City of New York, and defendant was a cosmetics manufacture in interstate commerce who had been sued for treble damages for failure to provide plaintiff with a demonstrator contrary to Sections 13(d) and 13(e) of the Robinson-Patman Act, Chief Judge L. Hand stated:

> "This ruling leaves open only two questions in the case at bar; first, whether it was an actionable wrong to deny the plaintiff, whose business is altogether intrastate, a favor which the defendant granted to 'agencies' in other states; . . . *True, the injury suffered by the plaintiff was to its intrastate business, but that is irrelevant. It is enough that the wrong be one of federal cognizance; its consequences are actionable whether or not they affect interests which are also of federal cognizance.* To recover for injuries done by a violation of the Food, Drug, and Cosmetics Act, 21 U.S.C.A. §301 *et seq.*, for example, *the sufferer need not himself be engaged in any federal activity; federal legislation is passed for the benefit of all citizens whom it may affect;* the means provided to protect their interests must be within the constitutional powers of Congress, but the interests protected need not be." (Emphasis added)

It is the fact, as necessarily found by the jury and approved by the Court of Appeals, that *respondent was itself in interstate commerce* that gave Congress the power to require that it not discriminate in price "where either or any of

the purchases involved in such discrimination are in commerce." (R. 329) The discriminatory sales at Santa Rosa, New Mexico, standing with the sales at Farwell, Texas, clearly, and, as the court below found, "read upon the literal language of the statute." (R. 329) It is the *effect on respondent*—elimination of its competitor and growth of monopoly—that the Robinson-Patman Act seeks to prohibit. In order to stop it, a cause of action was given to the injured competitor, petitioner in this case. That petitioner was not in interstate commerce, obviously has no bearing on the power of Congress so long as respondent is in interstate commerce. This was true even in Sherman Act cases. *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U. S. 390, 27 S. Ct. 65, 51 L. Ed. 241; *C. E. Stevens Co.* v. *Foster & Kleiser Co.*, 311 U. S. 255, 61 S. Ct. 210, 85 L. Ed. 173. There is no mystery about this concept just as there is no justification for the attempted confusion of the court below on this issue. And here it should be noted that respondent erroneously states that petitioner makes no contention that there were sales in interstate commerce or that such sales in any way affected commerce. (Resp.'s Brief 16, 21, 29) This is simply not true. Respondent's acts did affect commerce and the high price leg of its sales were in interstate commerce.

The Court of Appeals, even as respondent, has been led into error essentially because it has refused to accept the plain words of the statute. There is *no* requirement that the particular discriminatory sales must themselves be in interstate commerce or that the sales be competitive as between themselves. Section 2(a) of the amended Clayton Act clearly provides that it shall be unlawful "to discriminate in price between different purchasers of commodities . . . *where either or any* of the purchases involved in such discrimination are in commerce . . . " In Senate Report 1502,

74th Cong., 2d Sess., this was emphasized in the following language:

> "Section 2(a) attaches to competitive relations between a given seller and his several customers, and this clause is designed to extend its scope to discriminations *between interstate and intrastate customers*, as well as between those purely interstate. Discriminations in excess of sound economic differences involve generally an element of loss, whether only of the necessary minimum of profits or of actual costs, that must be recouped from the business of customers not granted them. When granted by a given seller to his customers in other States, and denied to those within the State, they involve the use of that interstate commerce to the burden and injury of the latter. *When granted to those within the State and denied to those beyond, they involve conversely a directly resulting burden upon interstate commerce with the latter. Both are within the proper and well-recognized power of Congress to suppress.*" (Emphasis added)

The trial court at the first trial stated after quoting the above, "I think that is exactly what the Robinson-Patman Act was designed for. The case comes clearly within its provisions." (R. 51, 53, No. 362, October Term 1951.) Where the language of the statute and the intent of Congress coincide, there can be no doubt of the meaning.

Both respondent and the Court of Appeals have great difficulty with the "effect" provisions which is attributable once again to a failure to completely absorb the statute. That part of the statutory provision, Section 2(a) reads as follows:

> ". . . where the effect of such discrimination *may be* substantially to lessen competition or tend to create a monopoly in any line of commerce, or *to injure, de-*

stroy, or prevent competition with any person who . . . grants such discrimination . . ." (Emphasis added)

Even the Court of Appeals concedes that the price discrimination at Santa Rosa "may be said to have been made for the 'purpose of destroying competition or eliminating a competitor' ". (R. 329) How then, where respondent discriminates in price for the *decided purpose of destroying* its competitor or *eliminating* petitioner as a competitor, can it be said that Mead's is not within the specific prohibitions of Section 2(a)? The very fact that petitioner was a competitor of a respondent who was in interstate commerce caused an "effect" which the Congress prohibited under Section 2(a). There is *no* statutory requirement whatsoever concerning the injured local competitor or that the injured local competitor be in commerce to any degree, so it is obvious that the "effect" provisions apply to the *effect on respondent* who, by reason of its interstate character and discriminatory sales, is prohibited from utilizing a trade practice that Congress has determined will enable monopoly to flourish. While it is true that petitioner was one of the many little business men—low on the economic scale of importance—there is nothing in Section 2(a) of the Clayton Act or in Section 3 of the Robinson-Patman Act that restricts those statutes only to battles of the giants. Rather, the history of the Robinson-Patman Act points directly to an intent to protect and preserve the little businessman and in that fashion to stop monopoly in its incipiency.

This Court has decided, after careful consideration, that the Robinson-Patman Act "does not require that the discriminations must in fact have harmed competition, but only that there is *a reasonable possibility that they 'may' have such an effect.*" *F. T. C. v. Morton Salt Co.*, 334 U.S. 37, 50, 68 S. Ct. 822, 830, 92 L. Ed. 1196; *Corn Products Co. v. F. T. C.*, 324 U.S. 726, 742, 65 S. Ct. 961, 969, 89 L. Ed. 1320.

It is indisputable that actual elimination of a competitor, as here, brings respondent within the very fact of reduced competition, and at the least, there is a certainty that a reasonable possibility exists that petitioner's destruction may have the effect of removing competition. That it took respondent almost eight months of below cost of production sales to remove petitioner as a competitor speaks well of the tenuous effort he made to fight off his unfair opponent.

It is evident that, on logic, the decided law as determined by this and other courts and in view of the recorded history of the Robinson-Patman Act, respondent's theories of commerce and the effects thereon of its wrongful acts are utterly lacking in support.

Respondent has cited some cases which petitioner does not believe are in point. In *Ewing-Von Allmen Dairy Co. v. C. & C. Ice Cream Co.*, 109 F. 2d 898 (6th Cir.), c. d., 312 U. S. 689, 61 S. Ct. 618, 85 L. Ed. 1126 (Resp.'s Brief 19, 20, 30), an action was brought under the *Sherman Act* for treble damages as the acts complained of occurred prior to the passage of the Robinson-Patman Act. It is a typical example of why it was necessary to pass the Robinson-Patman Act as the Sherman Act simply required a degree of proof that was not realistic or practical.

Respondent places great reliance on *F. T. C. v. Bunte Bros., Inc.*, 312 U.S. 439, 61 S. Ct. 580, 85 L. Ed. 881 (Resp.'s Brief 23) which involved Section 5 of the Federal Trade Commission Act, 15 U.S.C.A. §45(a), which empowered the Commission to prevent persons from "using unfair methods of competition in commerce." Section 2 of the Clayton Act was not in any way considered or involved. Bunte Bros. manufactured and sold candy in Illinois in break and take packages but not in other states. There were no interstate sales directly involved in the case. Section 5 of the Federal Trade Commission Act is entirely different from Section 2 of the Clayton Act, and it does not

contain the broad commerce coverage of the amended Clayton Act. For example nowhere in Section 5 of the Federal Trade Commission Act are there to be found any words equivalent to "in the course of such commerce, *either directly or indirectly*" or "where *either or any* of the purchases involved in such discrimination are in commerce" or "to injure, destroy, or prevent *competition with any person* who . . . grants . . . the benefit of such discrimination." 15 U.S.C.A. §13(a) (Emphasis added). The explicit purpose of the amended Clayton Act and its history clearly remove that statute from the obvious meaning of the law construed in the *Bunte Bros.* case, *supra*.

Respondent cites *Standard Oil Co. v. F. T. C.*, 340 U.S. 231, 236, 237, 71 S. Ct. 240, 243, 95 L. Ed. 239, apparently for the proposition that *all* sales have to be in interstate commerce. Such was not the case, and this Court was not called on to discuss the problem because there all the sales, both the low price and the high price legs, were in interstate commerce. In the instant case, the low-price leg is intrastate while the high-price leg is interstate. Whether either leg is or both legs are in interstate commerce, it is within the provisions of Section 2(a) of the Clayton Act. *Corn Products Refining Co. v. F. T. C.*, 324 U.S. 726, 65 S. Ct. 961, 89 L. Ed. 1320; *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F. 2d 234 (CCA 2nd), *Standard Oil Co. v. F. T. C.*, supra.

Respondent has, it is believed, unsuccessfully sought to distinguish *Porto Rican American Tobacco Co.* and *Corn Products Refining Co.*, supra. In the *Porto Rican case* the injured competitor was solely in intrastate commerce as is petitioner here, although the discriminatory sale actually moved interstate. It is apparent that cigarette sales in the United States were not competitive with sales in far-removed Porto Rico, but if the Porto Rican competitor were eliminated, it would injure him and encourage American

Tobacco's attempt to monopolize. The illegal effect on American Tobacco, which was in interstate commerce, was the jurisdictional basis for application of the Clayton Act. In *Corn Products Co.* the offender made the same objection made by respondent here, i.e., that the sales to Curtiss Candy Co. at Chicago were intrastate which would not give the Commission jurisdiction because of constitutional grounds. This Court then stated that since some of the sales, *and advertising*, were in interstate commerce, there was a discrimination well within the power of the Commission to remedy. Further, that the volume of commerce affected is small does not constitutionally restrict the exercise of power under the Clayton Act. *N.L.R.B. v. Fainblatt*, 306 U.S. 601, 606, 59 S. Ct. 668, 671, 83 L. Ed. 1014.

Respondent's authority fails of application to the facts of this case. The Robinson-Patman Act fully covers the wrong-doings of respondent. The judgment should be enforced.

2. Justification Is Not A Defense to This Cause of Action, and 15 U.S.C. 13(b) Is Not Applicable.

In its answer brief appellant has for the third time[1] in this Court attempted to raise the question of whether it was entitled to show that its price discrimination was justified by the existence of an alleged boycott of its products in Santa Rosa, New Mexico. These arguments have also been in all of respondent's briefs in the Court of Appeals. If there is any point which ought to have been laid at rest by the "law of the case" doctrine this is it.

[1] See Brief of Respondents in Answer to Petition for Writ of Certiorari, No. 294 Misc., Oct. Term, 1950; Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and Brief in Support Thereof, No. 362, Oct. Term, 1951; and Brief for the Respondent, No. 121, Oct. Term, 1954, Part A Point V and Part B Assignment No. I

Neither of the two points under which respondent argues this question in its present brief states wherein the trial court erred, and one of them (Part A, Point V) does not even do so in the argument. The argument under the other (Part B, Assignment No. I), excerpts only two sentences from the court's lengthy instruction on this point. (R. 232-234) This is an attempt to mislead this Court, for examination of the whole instruction will show that the respondent *did* get before the jury all the evidence about the so-called boycott, which the court admitted "to throw light upon the actions and conduct of the defendant," to determine if the price discrimination had the "effect . . . of lessening competition or tending to create a monopoly" or was "for the purpose of eliminating a competitor or destroying competition," and "to throw light upon the transaction in its entirety." (R. 233, 234) Petitioner objected to this instruction (R. 237) and to the admission of the evidence (R. 77, 90) and still thinks that this evidence should have been excluded altogether. The very word "boycott" is highly prejudicial to a jury, and the respondent used it to full advantage. It secured a much more favorable instruction on this point than was warranted.

In its first two briefs in this Court, respondent argued justification under the provisos of 15 U. S. C. § 13(a). Now for the first time it tries to justify its acts under 15 U.S.C. §13(b), contending that this section justifies *any* price discrimination made in good faith, merely shifting to the discriminator the burden of showing justification. This is changing horses in midstream which is not permissible. But notwithstanding the naivete of this theory is readily apparent. In the first place, §13(b) applies only to proceedings before the Federal Trade Commission, and this action is brought under §§13(a) and 13a. In the second place, the provisos of §13(a) *are* to be read into §13(b). *F. T. C. v. Ruberoid Co.*, 343 U.S. 470, 72 S. Ct. 800, 96 L. Ed. 1081.

Any other construction would result in almost unlimited justification and would in effect nullify the specific grounds of justification of §13(a).

Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc., 1st Cir., 194 F. 2d 484, cited by appellant, is not in point. It does not even involve the Robinson-Patman Act or the Clayton Act which it amended.

Respondent attempts, in Part A, Point V, to resurrect the long-dead issue of whether its alleged justification of meeting a so-called "boycott" can be squeezed in under the fourth "existing goods" proviso of §13(a) as a "response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned." In the first trial the District Court succumbed for this argument and dismissed the complaint at the close of plaintiff's case in chief. The Court of Appeals ignored this obviously untenable ground in its first opinion, 184 F. 2d 338, and in its second, 190 F. 2d 540, said:

> "It appears to us that the proviso cannot be given such a broad meaning. It is evident that it deals with special situations in connection with specific lots of goods which are of a perishable nature or become obsolete with the seasons or distress sales under court process or goods sold when a business is discontinued in good faith. The exceptions are not confined specifically to those set forth but the plain language of the statute limits the exceptions to those which are 'such as' or similar to those named. The changed market conditions caused by the understanding of the retailers in Santa Rosa to purchase only Moore's bread is not 'such as' or similar to the exceptions named."

Even the specially concurring opinion of Chief Judge Phillips, referred to by respondent at p. 57, went only so far as to say that Mead ought to be allowed to "justify by showing it reduced its price in good faith solely to break the boycott and not to destroy competition or to create a monopoly." Ibid., p. 542. This is just what the trial court did. The issues having been found by the jury in favor of petitioner, it must be assumed that it determined that Mead did have such a purpose or that its acts would have such an effect.

3. There Is Substantial Evidence to Support the Jury's Verdict for Damages and the Trial Court's Award of Attorney Fees.

Respondent attacks the verdict of the jury on the grounds that the market value of the bakery was greater after the price discrimination than before, that there was no certainty that petitioner would have made a profit, and that the verdict in any event was excessive. These will be dealt with in the order presented by respondent.

First, respondent says that the market value of petitioner's bakery was greater after the unlawful act than before, so there could be no damage. Petitioner believes this argument to be facetious. Both petitioner and Lehn Englehart testified that due to the rise in cost of steel and labor between 1947 and 1951 the value of physical equipment appreciated rather than depreciated. (R. 44, 161) However, we have this law suit because petitioner *lost* the equipment and his business was compelled to close on February 28, 1950. (R. 49) The only possible effect of this testimony is to show that petitioner lost the *undepreciated* value of his equipment. To say that one who loses his bakery, his business, goodwill, and ends up with an indebtedness of $4,013.62 has lost nothing because economic conditions were such that his physical assets had not depreciated.

is to beg the question. (R. 49, 58) At this point it should be noted that respondent is attempting to take advantage of an obvious misprint in the record at page 49 where it reads that petitioner was "solvent" at the time he closed business. He was obviously "insolvent" at that time, and this error was brought to the attention of the Court of Appeals in the Brief of Appellee, page 44. Petitioner questions the propriety of respondent's effort to mislead the Court on this point. Again respondent attempts to mislead when it states that petitioner did not tell what he salvaged. (Resp.'s Brief 64) The record clearly shows that petitioner had one old Chevrolet panel truck of a value of $550 and odds and ends of unmerchantable equipment. (R. 57, 58) If respondent wanted to explore further, he could have on cross-examination. In any event petitioner testified that the physical value of his equipment was $15,559.34 and the going concern value was $23,459.34. (R. 43, 44) John Englehart, a qualified expert in this field, testified that the physical value of the plant was $20,000. (R. 160) Respondent introduced absolutely *no* evidence on the subject of value or profits. Insofar as this record is concerned, there is not an iota of evidence to controvert petitioner on the damage issue. The jury, thus, had no alternative but to return a verdict for petitioner.

Second, respondent asserts that there was no certainty that petitioner would make a profit, therefore lost profits are not a proper item of damage. Along the same tenuous theory respondent casts in the idea that petitioner refused to compete, when in fact he fought respondent until February 28, 1950, and until he was economically exhausted. The real truth is that not only did petitioner compete, but he competed in the face of a vicious and determined price cut. The ability or inability of petitioner to make a profit without the illegal acts of respondent was made difficult

of proof because of respondent's acts, not because of anything that petitioner had done. This petitioner had the right to stay and compete with this respondent acting within the law—not without the law as it did. Respondent's acts denied petitioner this right. It is settled by this Court that under these circumstances respondent cannot complain. In *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555, 562, 563, 51 S. Ct. 248, 250, 251, 75 L. Ed. 544, the Court stated:

"Nor can we accept the view of that court that the verdict of the jury, in so far as it included damages for the first item, cannot stand because it was based upon mere speculation and conjecture. This characterization of the basis for the verdict is unwarranted. It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount.

* * *

". . . while the damages may not be determined by speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. *The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.*" (Emphasis added)

This doctrine followed that set in *Eastman Co. v. Southern Photo Co.*, 273 U. S. 359, 379, 47 S. Ct. 400, 71 L. Ed. 684. In turn the Tenth Circuit Court of Appeals followed it in a very recent case, *Kobe, Inc. v. Dempsey Pump Co.*, 198 F. 2d 416, 425-427, *c. d.*, 344 U. S. 837, 73 S. Ct. 46, 97 L. Ed. 651. The case here is much stronger than that adjudged in the *Kobe case* and *Story Parchment case* because here not only did petitioner have an established plant and financial setup, but he also had a record of successful experience in the same business which was lacking in the other two cases.

No doubt with tongue in cheek, respondent argues at pp. 72, 73, 76, and 77 of its brief that petitioner's loss of profits during the period of the price discrimination was only $299.72, that being 10 percent of the difference between petitioner's sales of bread in Santa Rosa during the price cut and during the corresponding period of the preceding year. (Petitioner testified that 10 percent of gross dollar volume was the normal or expected profit in the bread baking business (R. 71, 73, 119, 120), and Mr. Lehn Englehart, an expert witness, had testified that it would be 10 to 12 percent (R. 156-157)).

A glance at the large graph, Pl. Ex. 1, which is not in the printed record but has been filed with the clerk of this Court, will show the fallacy of this specious argument. After a period of readjustment while installing new machinery, (R. 43, 118) *petitioner's business was rapidly increasing* in volume before respondent's price cut, and he testified (R. 120, 121) that his volume would have been much *greater* during the period from September 3, 1948, to April 26, 1949, but for the price discrimination. He is certainly not limited to a comparison with the prior year, and neither do his recoverable profit losses end on April 26, 1949. As the trial court instructed the jury (R. 230,

231, 243), he may recover profit losses which were the after-effect of the price discrimination up to the day he went out of business February 28, 1950. Further, petitioner gave a complete explanation for the loss in profits which was apparently accepted by the jury. (R. 56, 118, 119) On a gross of $74,270.52 from February 1, 1949, to February 28, 1950, petitioner would have made a minimum net of $7,427.05 which does not appear to be an excessive return on his investment, labor, and experience.

Third, respondent states that the damages and attorney fees are excessive. The verdict was only for $19,000. It is the trebled figure that appears large, not the actual verdict. The basis for the verdict has been dealt with previously. This Court has stated in this connection that "... the finding of the jury upon that question must be allowed to stand, unless all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555, 566, 51 S. Ct. 248, 252, 75 L. Ed. 544. The statutory authority for recovery is unusual because it provides that one injured in his "*business or property*" may sue therefor. 15 U.S.C.A. §15. Respondent apparently takes the position that "business" means only "profit". There is nothing in the statute that would indicate such a restriction because if Congress meant only "profit", it easily could have said so. By *not* using the word "profit" Congress undoubtedly meant that "business" should be synonymous with "revenue". Petitioner here has lost not only revenue but profit too. The recovery provisions were meant to be broad, as the history of the Act indicates that civil suits for damages were to be an additional deterrent to the prohibited practies. Respondent introduced no evidence to negative or lessen the figures supplied by petitioner. Under these circumstances

a charge of excessive damages should not be given serious consideration. That the Court of Appeals refused to even comment on this issue is indicative that it has no merit.

Respondent makes several arguments presumably in its plea for reduced damages. One is that the price cutting had nothing to do with petitioner's business failure. Reducing the price of a staple, like bread, in half and well below the cost of production, as a matter of common sense could not keep from injuring a competitor. The jury had all the evidence and this argument before it and found that this suggestion had no merit. Respondent further states at page 31 of his Brief that it is good and there was no evidence that it picked off its competitors or practiced similar illegal acts at other places. This is a point which petitioner would have been delighted to explore in the courtroom had the elementary rules of evidence permitted the introduction of such facts. Obviously such facts are not admissible in a case like this. Finally, respondent argues that it could not dictate prices in Santa Rosa or any other place. It is evident that half-priced bread will necessarily set the market, if not the price, because no other bread will be bought, so the effect is the same as if the price were set. Respondent fails to help itself by resort to such specious theories.

Respondent finally states that $11,400 is an unreasonably high attorney fee. This represents 20% of the trebled damage figure of $57,000. At the time that fee was set, this case had been twice tried, briefed and argued at Oklahoma City before the Court of Appeals, petition for rehearing filed, petition for certiorari made to this Court, and after the second Court of Appeals opinion a brief in opposition to certiorari was filed. This is about as thorny a road for a lawsuit as is imaginable and speaks well for the time and labor involved. The novelty and difficulty of the ques-

tions presented are reflected in the granting of certiorari. The amount involved in this controversy is substantial. That the questions involved are novel and difficult is evident. Respondent should not be so ungenerous with petitioner's counsel because respondent asked for $7,500. attorney fees in his First Amended Counterclaim which was later dismissed by the trial court. In comparison with the presumed conservative standards of respondent's counsel, the fee set by Judge Carl A. Hatch, who was an outstanding attorney before going on the bench, is reasonable if not low. The best discussion of the method of arriving at attorney fees petitioner believes will be found in *American Can Co. v. Ladoga Canning Co.*, 44 F. 2d 763, 771 (CCA 7th), the elements for consideration of which have already been discussed. Petitioner has been unable to find a case setting attorney fees in a situation analagous to the case at bar, but there are numerous cases not analagous where they have been set. *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, 194 F. 2d 846 (CCA 8th); *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 24 S. Ct. 307, 48 L. Ed. 608; *William H. Rankin Co. v. Associated Bill Posters*, 42 F. 2d 152, c. d., 282 U. S. 864, 51 S. Ct. 37, 75 L. Ed. 765; *Milwaukee Towne Corp. v. Loew's, Inc.*, 190 F. 2d 561 (CCA 8th) c. d., 342 U. S. 909, 72 S. Ct. 302, 303, 96 L. Ed. 680; *American Crystal Sugar Co. v. Mandeville Island Farms*, 195 F. 2d 622, 334 U. S. 219, 68 S. Ct. 996, 92 L. Ed. 1328; *Blackhurst v. Johnson*, 72 F. 2d 644 (CCA 8th); *Merchants' & Manufacturers' Securities Co. v. Johnson*, 69 F. 2d 940 (CCA 8th), c. d., 293 U. S. 569, 55 S. Ct. 80, 79 L. Ed. 668. Respondent twice argued this case after trial before the District Court and any failure to adduce evidence (if such be permissible, on the subject of attorney fees cannot be attributed to lack of opportunity. Not only does petitioner feel that the attorney fees awarded are rea-

sonable, but that additional attorney fees should be awarded for services in the Court of Appeals and in this Court.

4. Cases Cited by Respondent Regarding Multi-Corporate Combinations Do Not Support Its Contention That Courts Cannot Look Behind A Facade of Separate Corporate Entities to Determine Whether the Combination Is In Interstate Commerce.

It is not difficult to find cases in which courts have made general statements to the effect that, as rather loosely paraphrased by respondent at p. 43 of its brief, they "will look behind a multi-corporate set-up only if there is evidence of a purpose to evade a statute or to practice a fraud upon third persons." Generally such cases involve questions of agency, in suits over contracts or in negligence actions. Frequently, even in such cases, after paying lip service to the rule, the courts find grounds for looking behind the corporate entity, and this is true in some of the cases cited by respondent.

None of these cases touches top, bottom or sides of the issue of whether a family of corporations, operated as a unit across state lines, may evade the power of Congress to regulate interstate commerce simply by forming a corporation in each state in which it operates. Petitioner does not want to burden the Court by distinguishing each of respondent's cases individually. However, he would like to call the Court's attention to one of these cases because it actually supports petitioner's position.

State v. *Swift*, Tex. Civ. App., 187 S. W. 2d 127, cited at p. 44 of respondent's brief, was an action under the Texas anti-trust laws and therefore did not involve the interstate commerce issue, but the court points out that it is a *question of fact* whether a corporation is the "adjunct, creature, stooge, or dummy of another corporation" (*ibid.*, p. 133), and that this device should not be allowed to be used to

violate the antitrust laws or defeat the jurisdiction of the regulatory body.

Since it is primarily a question of fact, then, let us look at those in this case. The evidence on this point is not in controversy. Indeed, it all came from respondent's officers, although as part of petitioner's case in chief. Respondent offered no testimony bearing on this question.

Here we have a family of five corporations, four of them called simply "Mead's Fine Bread Company," but distinguished in the testimony as Mead's Fine Bread Company of Clovis, New Mexico; Mead's Fine Bread Company of Lubbock, Texas; Mead's Fine Bread Company of Chaves County (Roswell, New Mexico); and Mead's Fine Bread Company of Big Spring, Texas. The fifth, Mead Service Company, stipulated in the first trial to be in interstate commerce, originally was a defendant in this action, but the complaint against it was dismissed (R. 222) when it appeared that it was a training organization for the other four corporations and had nothing to do with the acts complained of in this action. (R. 125, 129, 130)

Bakeries operated by these corporations at Lubbock and Big Spring, Texas, and Clovis and Roswell, New Mexico, served a wide area of Eastern New Mexico and West Texas, all marketing their product under the common trade-name, "Mead's Fine Bread," (R. 135) using substantially identical wrappers (R. 136). The same trade name was used by other Mead bakeries at Amarillo, El Paso, Wichita Falls, San Angelo and Abilene, Texas, Albuquerque, New Mexico, and Lawton, Oklahoma, which the testimony showed were operated by relatives of the Meads connected with the five corporations listed above. (R. 133, 134)

Four men—Billy O. Mead, Mack Mead, W. L. Mead and E. E. Corcoran, were all stockholders and directors of four of these corporations (Lubbock, Clovis, Roswell and Mead

Service), and they distributed all of the offices among themselves. Billy O. Mead was president of the Lubbock corporation and Mead Service Corporation, and vice-president of the Clovis and Roswell corporations. Mack Mead was secretary-treasurer of the Clovis corporation and Mead Service Corporation. W. L. Mead was president of the Clovis corporation. E. E. Corcoran was vice-president of all four corporations. One other man, A. K. Miller, was a stockholder and director of the Roswell and Mead Service corporations. (R. 124, 125, 129, 130, 133, 164)

The organization of the Big Spring corporation is not so well developed in the record, there being a conflict of testimony of respondent's officers concerning it. Mack Mead testified that he and Billy O. Mead, his brother, owned stock in it "at that time," apparently referring to the time of the price discrimination, but that they and the other stockholders in the Clovis, Lubbock, Chaves County and Mead Service corporations had no interest in it at the time of the second trial. (R. 134) W. L. Mead, father of Mack and Billy O., also had an interest in the Big Spring bakery but sold it. Billy O. Mead testified in his deposition, taken in September, 1949, that he was a stockholder and director of the Big Spring corporation (R. 125). However that may be, it is clear that the Big Spring bakery was operated as part of the combine in 1948, for its flour was purchased together with that of the Lubbock, Clovis and Roswell bakeries (R. 279-283), and it participated in their combined advertising program. (R. 146, 148, 250)

Apparently the Big Spring bakery was traded to E. P. Mead (uncle of Mack and Billy O.) for one at Hobbs, New Mexico, early in 1949. (R. 148) Mack Mead said the Hobbs bakery was acquired by the Lubbock corporation in 1949 and merged with it in 1950. Its officers in 1949 are not identified in the record except that Corcoran was vice-president,

a stockholder and a director, but it appears that W. L. and Mack Mead were among its stockholders before the merger. (R. 135, 164)

To say that this family of corporations had interlocking directorates is putting it mildly. At least with respect to the Clovis, Lubbock, Roswell and Mead Service corporations, their directors were identical except for the minor role played by Miller. The same is true of the stock ownership.

All of these men except Miller lived in Texas, from where they directed the affairs of the New Mexico corporations, making frequent interstate trips for this purpose. This was especially true of Corcoran, the sales manager for the Clovis bakery, who gave the order for the price discrimination. (R.143) He resided in Lubbock, Texas, as did Billy O. and Mack Mead. (R. 129)

The five bakeries operated by this combination served adjacent territories in West Texas and Eastern New Mexico, so divided that they were not in competition with each other. (R. 138) In fact, they commanded a solid, contiguous block of territory lying athwart the Texas-New Mexico line. That they also commanded a sizeable slice of the bread business in that area is indicated by the fact that the Lubbock bakery boasted the largest oven between Fort Worth, Texas, and Phoenix, Arizona! (R. 149)

Before the Clovis bakery was acquired in 1946, the Lubbock bakery trucked bread into Clovis and still does in the event of breakdowns of equipment in the Clovis plant. (R. 142) The Clovis bakery trucked bread as far as Las Vegas, in north central New Mexico, in a large van-type truck. (R. 48, 143)

The common advertising program of the Clovis, Lubbock, Big Spring, and Roswell, bakeries offers one of the most

interesting examples of how these corporations were interwoven into a single enterprises. The deposition of Rex Webster (R. 146-154, 249-251) details how the advertising firm of Buckner, Craig & Webster handled this advertising program, billing each firm for the newspaper, radio, theater and outdoor advertising placed in the area in which each bakery operated. Although the accounting periods do not match exactly, it appears from the totals on pages 250 and 251 of the record that these four bakeries spent over $80,000 in 1948 and the first nine months of 1949 with this one advertising firm, nearly $38,000 of it being paid by the Lubbock corporation. The heavy share of the Lubbock corporation is accounted for by the fact that the bakery that used the advertising first, or originated it, paid for the mats, art work, etc., and Lubbock was usually the first. (R. 153) The others got a free ride as far as these services were concerned and usually had to pay only the time and space charges for the advertising placed in their respective territories. As Webster said, ". . . Lubbock . . . is the focal point, at least so far as we are concerned." (R. 153)

The Hobbs bakery joined this advertising program in June, 1949, but its contribution was small. (R. 251)

According to Webster, advertising in the Lubbock and Clovis areas was generally authorized by Billy O. Mead, Mack Mead, or Corcoran. (R. 147)

The whole advertising program, as evidenced by the examples appearing in the record at pages 255-275, was intended to sell "Mead's Fine Bread," without regard to where it was baked. Usually the name of the bakery did not even appear. Webster and Mack Mead have testified to this common purpose. (R. 136, 137, 149) and the latter admitted that advertising done in one bakery's territory might help a Mead bakery located in an adjacent area. (R. 138)

If any more proof is necessary of the operation of these bakeries as a single enterprise, it is supplied by the two flour purchasing contracts appearing at pp. 279-283 of the record. Through these contracts "Mead's Fine Bread Co." (with no differentiation among the corporations) ordered flour from the Harvest Queen Mill & Elevator Company, Plainview, Texas, to be delivered at Lubbock, Big Spring, Clovis, and Roswell. The quantity of flour is defaced on one contract in the record, it actually being for 6,000 cwt., the other is for 5,000 cwt. Mr. Corcoran, vice-president, stockholder and director of all but the Big Spring corporations, has testified that this was a joint order of flour. (R. 169)

Appellant never contradicted or explained this evidence in any way. It is a fair assumption that these were not isolated examples or appellant's officers would have been quick to say so.

The evidence is overwhelming that these five corporations with their four (later five) bakeries, were operated as one enterprise. There remains to be considered, then, only the legal effect of such a combination.

It is obvious in this case that different corporations were organized in New Mexico and Texas in order to keep them out of interstate commerce. There is nothing illegal in this purpose, but the question is whether the plan was successful.

As observed in *Baush Machine Tool Co. v. Aluminum Co.*, 2 Cir., 72 F. 2d 236, 239, 240, "Monopolies are frequently attained by the acquisition of the controlling interest in one corporation after another. [Citing authorities] *Although the acquisition of itself is not illegal, the stifling of competition by the application of the concentrated power is.*" (Emphasis added)

"Acts in themselves lawful considered alone, if part of a plan for controlling prices to eliminate competition in interstate commerce, are unlawful. *United States* v. *Socony*

Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129; *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 60 S. Ct. 618, 84 L. Ed. 852." *Louisiana Farmers Protective Union v. Great A. & P. Tea Co.*, 8 Cir., 131 F. 2d 419, 422.

In *Collins Baking Co. v. N.L.R.B.*, 5 Cir., 193 F. 2d 483, 485, a bakery organized as a separate corporation and, unlike Mead's Fine Bread Company, selling none of its products across state lines, was held subject to the National Labor Relations Act because it imported its raw materials and because it was part of an interstate combination of bakeries. There the Court said:

> "Petitioner challenges the Board's jurisdiction because petitioner's products are sold wholly within the State of Alabama, where they are manufactured. But petitioner annually imports from other states, and used in producing its manufactured products, raw materials valued at approximately $250,000, the flow of which in commerce would be directly affected by work stoppages. Imports as well as exports constitute interstate commerce within the meaning of the National Labor Relations Act, 29 U.S.C.A. §152 (6) (7). If the flow of commerce is obstructed by labor disputes, it makes no difference in principle whether the interference is with the inward or outward movement of goods. Commerce is affected in either case. . . . It follows that petitioner's business is subject to the Act, and the Board has jurisdiction of the matter in controversy. . . .
>
> "Moreover, petitioner is an integral part of Campbell-Taggert Bakery Service Corporation, which own or control 49 baking companies located in numerous states. It also owns the controlling interest in petitioner's common stock. Petitioner markets its bakery products under the nationally advertised and copyrighted trade name of 'Colonial,' which trade name is owned by Campbell-Taggert. Through its control of petitioner's

Board of Directors, Campbell-Taggert in effect controls the business operations and labor practices of petitioner. *This close integration of ownership and operation with a bakery chain operating in several states effectively removes petitioner from the realm of purely local enterprise . . . .*" (Emphasis added)

The situation is practically identical in our case except that Mead's Fine Bread Company of Clovis, New Mexico, sold bread on a regularly scheduled delivery service to retailers in Farwell, Texas (R. 131), and did not confine itself strictly to sales within the State of New Mexico.

For application of this principle to other acts of Congress, see *Electric Bond & Share Co. v. Securities and Exchange Commission*, 303 U.S. 419, 58 S. Ct. 678, 686, 82 L. Ed. 936, 115 A.L.R. 105 (Utility Holding Company Act); *Northern Securities Co. v. U.S.*, 193 U.S. 197, 24 S. Ct. 436, 48 L. Ed. 679 (Sherman Act); *A. H. Phillips, Inc. v. Walling*, 324 U. S. 490, 65 S. Ct. 807, 89 L. Ed. 1095, 157 A.L.R. 876, and *Walling v. American Stores Co.*, 3 Cir. 133 F. 2d 840 (Fair Labor Standards Act).

This principle has been applied to the Clayton Act from its inception. *U. S. v. United Shoe Machinery Co.*, (D. C.) 234 Fed. 127. Respondent has cited no cases which detract from the decisions cited above. In fact, two of respondent's cases could be cited by petitioner. They are *Stone v. Eacho*, 4 Cir., 127 F. 2d 284, and *E. Albrecht & Son v. Landy*, 8 Cir., 144 F. 2d 202. In *Stone v. Eacho* the court decided to "tear asunder the legal maze of corporate fiction" in a bankruptcy case, and in the Albrecht case the same result was reached in a tax case.

In the other cases cited by respondent, *Nichols & Co. v. Secretary of Agriculture*, 1 Cir., 131 F. 2d 651, *Esmond Mills v. Commissioner of Internal Revenue*, 1 Cir., 132 F. 2d 753, *Owl Fumigating Corp. v. California Cyanide Co.*, 3 Cir.,

30 F. 2d 812, and *State v. Swift*, Tex. Civ. App., 187 S.W. 2d 127, the rule for disregarding corporate entity was recognized but the facts were held not to justify application of the rule. None of these cases involved a fact situation similar to that in the instant case, and none, incidentally, concerned the federal antitrust laws.

The legal principle is so well settled that we need look only to the facts, and it is submitted that the facts in this case amply justify application of the rule. Here the various corporations were nothing but the alter egos of four men, and the acts of the corporation are in effect their acts. If four individuals engaged in such a business enterprise without benefit of a corporate smokescreen there could be no doubt but that they were in interstate commerce, and that should be the test in this case.

5. It is Immaterial in This Case that Regular Shipments From Clovis, New Mexico, to Farwell, Texas, Were Temporarily Suspended by Respondent During the Early Part of the Period of Price Discrimination.

Although the point was not properly raised or preserved, respondent now contends that, because it temporarily suspended the operation of its interstate bread truck route for a period which included the early portion of its price war in Santa Rosa, the trial court's instruction to the jury on the question of damages was erroneous. (Resp.'s Brief 25-31, 59-61)

In so doing, respondent apparently is oblivious of the fact that, if this argument is accepted, it jerks the rug from beneath its own feet on the issues of boycott and justification which it has attempted to raise. If respondent was not engaged in interstate commerce at the beginning of its below cost price cutting, then it cannot claim the benefits of the justification provisos of the Robinson-Patman Act.

However, petitioner's case on the commerce issue does not rest on a single pillar. He contends also that respondent corporation was part of an interstate combination of baking companies with interlocking directorates, common majority stockholders, common trade name, a common purchasing arrangement, and a common advertising program, and that everything this corporate family did constituted interstate commerce or affected it.

The parties stipulated (R. 131, 132) that respondent operated, *on a regular schedule*, a bread route from Clovis, New Mexico, to Farwell, Texas, from September 18, 1946, until January 16, 1948, and from December 27, 1948, until the winter of 1951, and thus was not selling bread across the state line during 115 days of the 235-day price cutting period. It was in operation for a year and four months before and during the last four months of the price cut, as well as afterward.

It is reasonable to infer from the stipulation—and from the failure of respondent's officials to explain the matter further from the witness stand—that the suspension during the early part of the price cut was only *temporary*.

Be that as it may, it would be impossible to segregate petitioner's damages in the manner now urged by respondent. This is particularly true of the loss of his business. Who could say whether it was the first or second half of the price war that caused him to become insolvent? It is respondent's own wrongful conduct that has rendered difficult the ascertainment of the precise damages, and it is not entitled to complain. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379, 47 S. Ct. 400, 405, 71 L. Ed. 652; *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 51 S. Ct. 248, 75 L. Ed. 544.

The case went to the jury under proper instructions (R. 221, 243), and the jury undoubtedly weighed the damage issue carefully. There is nothing about the size of their

verdict to indicate any tendency to favor the petitioner unduly. In fact, it can be justified on loss of the petitioner's business alone, without regard to lost profits or lost revenue, as discussed more fully elsewhere.

The court's first instruction (R. 231) on this point was met by a general objection from respondent (R. 240) which did not make it clear that it objected to permitting the jury to award damages accruing from September 3, 1948, to January 16, 1949. The court then gave a further instruction (R. 243) to which respondent interposed only the additional objection that the jury should have been required to "first find whether or not the plaintiff would have made a profit from the sale of bread." (R. 244) It cannot be said that the court was made aware of the objection now urged by respondent. Failure to object distinctly to a charge justifies an appellate court in refusing to consider the point. *Sherlin-Hixon Co. v. Smith*, 9th Cir., 165 F. 2d 170; *Farley v. Roberts*, 1st Cir., 138 F. 2d 518, c. d. 321 U.S. 788, 64 S. Ct. 786, 88 L. Ed. 1078.

Incidentally, respondent tendered no instruction on this point, and neither is it in the pleadings.

It should also be noted that this assignment of error does not coincide with the statement of points to be relied upon (R. 1-4) specified in accordance with Rule 75 (d) of the Rules of Civil Procedure, and respondent did not designate the complete record to be sent up on appeal. Apparently it thought a lot more of this point in retrospect.

Shaw's, Inc. v. Wilson-Jones Co., 3rd Cir., 105 F. 2d 331, cited by respondent at p. 60 of its brief, has no bearing on this case, and in fact counsel has taken a statement from it out of context.

Respondent's Part B, Assignment No. II (Resp.'s Brief 59-61) should be disregarded because it was not properly raised at the trial, was not preserved on appeal, and is not valid even if it was so raised and preserved.

6. Respondent Has Completely Misunderstood Petitioner's Contention Regarding Applicability of the "Law of the Case" Doctrine.

Petitioner does not, as respondent seems to think, contend that this Court is bound by the decisions of inferior courts on prior appeals. (Resp.'s Brief 45-47) As stated under Point II at pages 35-39 of petitioner's opening brief, which need not be repeated here, the peculiar history of this action justifies the assumption that this Court considered whether or not petitioner had pleaded and proved a prima facie case in the original trial when it granted certiorari the first time and remanded the case to the Court of Appeals for further consideration in the light of a specific case, and then, after the court below reversed itself, denied certiorari to the present respondent.

It is true that the Court of Appeals might very well have disposed of the second appeal in petitioner's favor under the "law of the case" as spelled out in its second opinion, but its failure to do so is not urged here as error. Cases cited by respondent are directed to the ordinary situation where an appellate court is asked to reconsider matters determined in a prior appeal, or where this Court simply has denied a prior petition for certiorari, and it is not necessary to discuss such cases here.

Petitioner contends that this Court should not go behind its mandate on the first appeal, especially in view of its subsequent denial of certiorari to respondent after the Court of Appeals, acting on this mandate, reversed itself and the District Court and ordered a new trial. Matters necessarily considered by this Court in taking jurisdiction—especially the commerce issue—should not be reopened, since the evidence in the second trial was for all practical purposes identical to that in the first.

In this connection, it is significant that respondent failed to take up petitioner's challenge on p. 39 of his opening brief to point out any substantial difference in the evidence adduced in the two trials. Undoubtedly it would have done so if it could have, for this is one of the most common defenses to the doctrine of law of the case.

Respectfully submitted,

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